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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA, ) No. CR 16-00440 WHA  
15 Plaintiff, )  
16 v. ) **UNITED STATES' OPPOSITION TO  
17 DEFENDANT'S MOTION IN LIMINE NO. 3 RE  
EXCLUSION OF EVIDENCE OF NIKULIN'S  
FINANCES AND LIFESTYLE (ECF 144).**  
18 YEVGENIY ALEXANDROVICH NIKULIN, )  
19 Defendant. ) Trial: March 9, 2020  
20 ) Pretrial Conference: February 19, 2020  
21 ) Time: 1:30 p.m.  
22 ) Courtroom No. 12  
23 )  
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28 )

21 **I. INTRODUCTION**

22 Defendant has filed a Motion in Limine to exclude any evidence suggesting he had an opulent  
23 lifestyle, on the basis that it is not relevant and is prejudicial. ECF No. 144. Defendant's motion  
24 specifically references "photographs of him with exotic cars and eating in what appear to be high-end  
25 restaurants." As a practical matter, the United States does not intend to introduce such photographs in  
26 its case-in-chief. The government may seek to introduce the photos for the purpose of impeachment, if  
27 defendant testifies, or rebuttal, if the defense team presents a defense of penury or that undermines  
28 Nikulin's financial motive to commit the crimes. Accordingly, the United States requests that the Court

U.S. OPP. TO MTN. TO EXCLUDE EVID. OF WEALTH  
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1 hold Defendant's Motion in Limine No. 3 in abeyance, and wait to see if the issue presents itself at trial.

2 **II. ARGUMENT**

3 **A. The Limited Evidence of Wealth the Government Intends to Use in Its Case-in-Chief.**

5 The United States' Exhibit List (ECF No. 123) does not include any photographs of defendant  
 6 flaunting his lavish lifestyle. There is one cell phone video on the list, which briefly shows the back end  
 7 of a dark-colored Bentley. (Exhibit 72, YN14096.) The person making the video is the passenger in a  
 8 different sedan and is describing how there will be a summit of hackers at the Vega Izmailovo Hotel in  
 9 Moscow. As the sedan in which the narrator rides pulls up to the hotel, the narrator says, in Russian,  
 10 "Look, what an angry person. Angry hacker," seemingly in reference to whomever is in the Bentley.  
 11 This video provides context for a second cell phone video shot the same day by the same person—  
 12 Exhibit 74, YN14097—which shows participants in the "summit," including defendant.

13 The government will lay a proper foundation for the videos. The presence of the Bentley in the  
 14 first video is incidental, and the government will not dwell on it. Nor will the government argue that the  
 15 vehicle is somehow proof that the hackers at the summit were profiting handsomely from their illegal  
 16 activities. The government's use of the videos is in line with Ninth Circuit case law, which recognizes  
 17 that isolated references to wealth are not prejudicial. *See United States v. Little*, 753 F.2d 1420, 1441  
 18 (9th Cir. 1984).

19 **B. Other Evidence of Wealth that May Be Used in Rebuttal or Cross-Examination.**

20 The government is in possession of more direct evidence of defendant's wealth and spending.  
 21 Most of that evidence is photographs posted to defendant's public Instagram account. There is also a  
 22 video of defendant available on YouTube which features him discussing his high-end automobile  
 23 collection.

24 While the government does not intend to offer this evidence in its case-in-chief, it is worth  
 25 noting that the Ninth Circuit has long held that "evidence that tends to show that a defendant is living  
 26 beyond his means is of probative value in a case involving a crime resulting in financial gain." *United*  
*27 States v. Feldman*, 788 F.2d 544, 557 (9th Cir. 1986) quoting *United States v. Saniti*, 604 F.2d 603, 604  
 28 (9th Cir. 1979) (per curiam). *See also United States v. Bailie*, 99 F.3d 1147, \*7 (9th Cir. 1996)

1 (unpublished) (in embezzlement case, trial court did not err in admitting evidence of defendants' opulent  
2 lifestyle, including homes, condos, expensive cars, and chauffeured limousine). Financial gain is an  
3 element of the offenses charged in Counts One, Three, Four, Five, Six, Seven, and Nine. Thus, it is the  
4 *Saniti/Feldman* line of authority in criminal cases that should control any Rule 401, 403 analysis in this  
5 case, rather than the three civil cases cited in defendant's motion.

6 For present purposes, however, the authority most on point is *United States v. Kessi*, 868 F.2d  
7 1097 (9th Cir. 1989), a securities fraud case which holds that evidence of wealth is permissible to rebut a  
8 defense presented at trial. Kessi's defense was that he suffered from post-traumatic stress disorder that  
9 prevented him from forming the requisite criminal intent. To rebut this defense, the prosecution  
10 introduced evidence of the value of Kessi's home and yacht and of his financial success. The *Kessi*  
11 court reasoned that such evidence showed that Kessi rationally joined the scheme out of financial  
12 motivation and that he willingly participated in social and leisure activities.

13 Given the mental health issues that have already been litigated in this case, it is conceivable that  
14 defendant might try a similar defense. Alternately, defendant might testify and claim he was a simple  
15 auto-mechanic who lacked the sophistication or resources to commit the alleged crimes. Were  
16 defendant to mount such a defense, evidence of his lifestyle would indeed become relevant, just as it did  
17 in *Kessi*.

### 18 III. CONCLUSION

19 Given the uncertainty as to what evidence defendant will present at trial, if any, the United States  
20 requests that the Court hold Defendant's Motion in Limine No. 3 in abeyance.

21 DATED: February 12, 2020

Respectfully submitted,

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23 United States Attorney

24 /s/

25 MICHELLE J. KANE  
26 KATHERINE WAWRZYNIAK  
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